

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	
THE UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
THE COMMONWEALTH OF)	
MASSACHUSETTS, et al.)	Civil Action No. 05-10112 JLT
)	
Defendants, and)	
)	
THE COALITION FOR BUZZARDS BAY,)	
)	
Intervenor-Defendant)	
_____)	
)	
THE AMERICAN WATERWAYS OPERATORS,)	
et al.)	
Intervenor-Plaintiff)	
)	
v.)	
)	
MITT ROMNEY, Governor of Massachusetts, et al.))	
)	
Defendants)	
_____)	

**AMICI CURIAE MEMORANDUM IN SUPPORT OF DEFENDANTS'
OPPOSITION TO THE PLAINTIFFS' MOTION FOR JUDGMENT ON THE
PLEADINGS**

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STATEMENT OF INTEREST

The following amici parties are communities that share Buzzards Bay as a unique and common resource. Bourne was incorporated in 1884; it is made up of quiet harbors and inlets used for boating, swimming, and shellfishing. 16,064 people reside in Bourne. Dartmouth was incorporated in 1664; it is a suburban residential community of 27,244 residents. Dartmouth continues to maintain its agriculture and fishing character. Fairhaven was incorporated in 1812; it is a suburban, fishing, and resort community with a population of 16,132. Falmouth was incorporated in 1686; it is home to 27,960 residents. Falmouth has one of the longest coastlines in the state making those waterfront and water view properties highly coveted. The town of Gosnold, also known as the Elizabeth Islands, was incorporated in 1864. It consists of a chain of 12 islands running westward from Woods Hole to Vineyard Sound. There are 98 year round residents in Gosnold. Mattapoisett was incorporated in 1857; it has a population of 5,850. Mattapoisett receives a large influx of summer residents. Marion was incorporated in 1852; it has a population of 4,496. It hosts a variety of waterfront programs, including swimming on town beaches, pleasure boating and fishing. The city of New Bedford was incorporated as a town in 1787 and as a city in 1847. It was a world whaling capital in the 18th century and it is presently the largest revenue-producing fishing port on the east coast of the United States. 99,922 people reside in New Bedford. Rochester was incorporated in 1686 and included Marion, Mattapoisett and West Wareham. In 1857 Rochester split from the other towns but maintained rights on their seashores. Rochester has a population of 3,921 and its residents enjoy shellfishing rights and beach use in other towns. Wareham was incorporated in 1739 and is situated at the head of Buzzards Bay; it has over 54 miles of coastline enhanced by beaches, estuaries, rivers

and ponds. Wareham has 19,232 year round residents. Westport was founded in 1787 and has an abundance of natural resources. It has a population of 13,852.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Bartholomew Gosnold was precise in his description of Buzzards Bay as “the stateliest sound as I was ever in.” when he sailed into it in 1602. It is within that historical construct that the amici communities situated in and around Buzzards Bay request that the Court deny plaintiff’s Motion for Judgment on the Pleadings and uphold the Commonwealth of Massachusetts’ Act Relative to Oil Spill Prevention and Response in Buzzards Bay and Other Harbors and Bays in the Commonwealth, 2004 Mass. Acts 251 (Aug 4, 2004), as amended by 2004 Mass. Acts 457 §1 (Dec. 30, 2004) (Oil Spill Prevention Law) that was passed expressly to protect this unique, ecologically sensitive bay. Buzzards Bay is unique in its location between the Atlantic Ocean, Vineyard Sound, and Cape Cod Bay. Its unique positioning provides for exceptional marine habitats and favorable access to productive fisheries. For centuries the amici communities have looked to and depended on Buzzards Bay for its abundant resources. This “stately sound” continues to determine much of the amici communities’ future economic stability.

Keeping Buzzards Bay stately and pristine is a task that has become increasingly difficult. As a major thoroughfare for petroleum transportation, bordering communities bear an unreasonable burden from oil spills. In recent history, approximately 473,000 gallons of petroleum product have been reportedly discharged into the Bay. *Navigation and Waterways Management Improvements, Buzzards Bay, MA*, 69 Fed. Reg 62427, 62428 (Oct. 26, 2004).²

¹ Massachusetts Department of Housing and Community Development, *Community Profiles*, (visited July 11, 2005) <http://www.mass.gov/dhcd/iprofile/default.htm>

² “Since 1969 there have been several significant incidents of tank barge groundings and tank barge groundings with oil spills in Buzzards Bay, including the grounding of the tank barge Florida in 1969 with a spill of approximately

These incidents caused a significant adverse impact on local economies, coastal and marine environments. *Id.*³

In July of 2004, after the horrific Bouchard-120 98,000+ gallon spill in 2003, the majority of amici communities submitted a statement of principles to the Massachusetts General Court in support of the Commonwealth's Oil Spill Prevention law. This legislation has the necessary provisions to protect the Bay from oil spills and will go a long way in protecting the resources that are crucial to the amici communities' economies.

ARGUMENT

I. OIL SPILLS PRESENT A SUBSTANTIAL THREAT TO THE BUZZARDS BAY COMMUNITIES

A. Buzzards Bay is a Unique and Valuable Ecosystem Requiring Special Legal Protection from Oil Spills

The Buzzards Bay ecosystem supplies a variety of unique habitats which support diverse and valuable marine life. These ecologically significant but highly sensitive habitats include: salt marshes, tidal wetlands, eelgrass beds, tidal flats, barrier beaches, rocky shores, and tidal rivers and streams. Brian L. Howes et.al., *Ecology of Buzzards Bay: An Estuarine Profile* 8 (1996). Salt marshes are among the most productive ecosystems in the world; they provide critical wildlife habitat, and produce large quantities of food to coastal food webs. Buzzards Bay Project et al., *Buzzards Bay Comprehensive Conservation and Management Plan* 17 (1991). Much of Buzzards Bay's best recreational fishing, shellfishing, and waterfowling areas are supported by

175,000 gallons of No. 2 fuel oil; the grounding of the tank barge Bouchard in 1977 with a spill of approximately 81,000 gallons of No.2 fuel oil; the grounding of the tank barge ST-85 in 1986 with a spill of approximately 119,000 gallons of gasoline ... and the grounding of the barge B-120 in April 2003 with a spill of No. 6 oil ... approximately ... 98,000 gallons."

³ "Groundings or collisions of tank barges could lead to a significant discharge or release of oil or other hazardous material, as demonstrated by the incidents noted above, with potentially significant adverse impacts on the coastal and maritime environment, and the local economy."

salt marshes. *Id.* Eelgrass beds are also critical habitat providing vital food-production for aquatic life and serving as spawning grounds for bay scallops and winter flounder. *Id.* Other commercial and recreational finfish species depend on a clean Buzzards Bay for spawning and nursery grounds; these include scup, sea bass, tautog, butterfish, shad, and alewife. Oil spills wreak massive devastation on these marine environments. Petroleum products leave carcinogenic residue in salt marshes that persist for decades thereby affecting all aquatic life depending on that habitat. Christopher M. Reddy et al., *The West Falmouth Oil Spill After Thirty Years*, Environmental Science and Technology, Vol. 36, No. 22, 2002, at 4760.⁴

Other wildlife depending on Buzzards Bay's marine habitats include the federally protected, endangered roseate tern and the piping plover, a species listed as "threatened" under Massachusetts law. Oil spills unnecessarily cause mortality to these already declining sea bird populations. These sensitive, irreplaceable resources require special protections from oil spills, a situation that is again unique to Buzzards Bay.

B. The City and Towns Surrounding Buzzards Bay Depend on the High Quality Resources Buzzards Bay Provides

Buzzards Bay's unique geographic position between the Atlantic Ocean, Vineyard Sound and Cape Cod Bay provides ideal marine habitats for productive fisheries. New Bedford and Wood's Hole are major fishing ports for some of the world's most productive offshore fishing grounds, notably George's Bank. Brian L. Howes et.al., *Ecology of Buzzards Bay: An Estuarine Profile* 7 (1996). Atlantic cod, mackerel, haddock, striped bass, and winter flounder harvests off the Bay contribute significantly to the local economy, as do ocean scallops, bay scallops, quahogs, soft shelled clams and lobster. *Id.* at 13-14. Oil spills devastate these fishing industries, causing the

⁴ "Petroleum residues from the Florida spill continue to persist in Wild Harbor sediments after thirty years and will likely remain indefinitely."

entire Buzzards Bay community to suffer. Oil contaminated marine habitats cause decline in the rate of fish reproduction, reducing the quantity and quality of the fishable population for the recreational and commercial fishing industries. In the Bouchard oil spill in 2003, thousands of acres of shellfish beds were closed due to petroleum contamination. Some remain closed today.

In addition to the economically valuable fisheries, Buzzards Bay also attracts tens of thousand of tourists annually. More than 230,000 year round residents make their permanent homes around Buzzards Bay; that number increases dramatically during the summer months. The Bay's many natural harbors, inlets and coves create ideal conditions for recreational boating, swimming, fishing, sailing, and other activities. *Id.* at 14. The watershed accounts for 41% of all domestic travel to Massachusetts in the summer time. Research Department of the Travel industry Association of America, *The Economic Impact of Travel on Massachusetts Counties*, (2003). In the 2003 oil spill more than 93 miles of shoreline were polluted causing long term closure of many beaches. Communities were severely affected by these beach closings. Recreational fishing licenses, seasonal rentals and private businesses dependent on tourism suffered significant downturns.

Oil spills degrade the resources of Buzzards Bay and adversely affect the future economic stability of the amici communities. Buzzards Bay requires special protection to maintain the existence of its unique high quality resources.

C. The City and Towns Surrounding Buzzards Bay Bear a Disproportionate Risk of Oil Spills

Buzzards Bay is characterized by its dangerous ledges, reefs and currents. The Cape Cod Canal, Cleveland Ledge at the northeast corner, and the treacherous 'Sow and Pigs' and 'Hens and Chickens' reefs in the southwest make the Bay especially difficult to navigate. Buzzards

Bay has a mean depth of only 36 feet, and it is only 8 miles wide. In spite of these inherent dangers to navigation some 2 billion gallons of petroleum products pass through Buzzards Bay each year. United States Army Corp of Engineers Power Point Presentation. 80% of those trips are made in single hull barges. *Id.* The navigational hazards, together with current inadequate methods of transportation, subject the amici communities to a disproportionate and unnecessary burden of oil spill risk. In 1969, 189,000 gallons of No. 2 fuel oil spilled into the Bay after the barge Florida ran aground off West Falmouth; in 1974, 37,000 gallons of oil spilled from Bouchard Barge-65; in 1977 the Bouchard Barge-65 again spilled 81,000 gallons of oil; in 1990 the Bermuda Star released 7,500 gallons of No.6 heavy fuel oil into the bay; and in 2003, the Bouchard – 120 released 98,000 gallons of heavy fuel oil killing hundreds of birds, closing thousands of acres of shellfish beds, generating a clean up cost of approximately \$36 million.

It is manifestly unfair to allow this disproportionate burden to continue without allowing legislative protections that address Buzzards Bay's unique situation to reduce the risk of oil spills.

II.THE COMMONWEALTH'S OIL SPILL PREVENTION LAW PROPERLY PROTECTS THE RESOURCES OF BUZZARDS BAY

A. The Provisions of the Oil Spill Prevention Law Reduce the Risk of Oil Spills

In July 2004 the majority of amici communities rallied to support the proposed Oil Spill Prevention Law and strongly encouraged the governor to sign it. An oil spill prevention "Statement of Principles" was sent to the governor's office from each municipality around Buzzards Bay stating the following:

"Whereas Buzzards Bay was designated by the United States Congress in 1985 as an 'Estuary of National Significance', and whereas Buzzards Bay suffered a catastrophic oil spill on April 27, 2003 when the Bouchard barge-120 spilled approximately 98,000 gallons of fuel oil, and whereas the above mentioned oil

spill was the second largest in the Bay's history, took the lives of more than 450 seabirds, fouled miles of beaches, and contaminated shellfish beds, and whereas the economic damage from this spill affected tourism, fishing, real estate and other local industries to an as yet undetermined amount, and whereas the lessons learned from the Bouchard barge-120 oil spill highlight the need to protect all of our state waterways, We support the following principles for the prevention of future oil spills in our state waters:

1. Massachusetts should adopt navigational safety regulations at least as strict as other coastal states in America. These measures must include a clearly defined vessel route and establishment of a state of the art Vessel Traffic Service (VTS) System for the Bay.
 2. Additional protection from aging and dangerous single hulled barges is required to offset the increased risk posed by the continuing use of these vessels in our state waters. Single-hull barges are legal under federal law until 2015. In the interim, Massachusetts should require that these barges are assisted by escort tugs and have additional crews to respond to accidents.
 3. Penalties and fines for discharge of oil and/or hazardous waste into state waters should be reflective of the size and impact of the spill. Current State laws severely limit the Attorney General from penalizing companies that spill oil.
 4. An Oil Spill Prevention and Response Fund should be established based on the amount of oil delivered to Massachusetts' ports and used for the purchase of oil spill clean up equipment, first responder training, and oil spill mitigation costs. A similar fund was created in the State of Rhode Island following the 1996 North Cape spill and has been a great success story.
- Signed –

The Oil Spill Prevention Law became law on August 4, 2004. 2004 Mass. Acts 251 (Aug 4, 2004), as amended by 2004 Mass. Acts 457 §1 (Dec. 30, 2004). It contains the provisions necessary to reduce the risk of a future oil spill in the Buzzards Bay and thereby protect the Bay's resources and those dependent upon them.

The escort tug requirement for vessels transporting 6,000 or more barrels of oil through Buzzards Bay will provide the necessary redundancy a large vessel needs when traveling through a narrow and hazardous Bay. Mass. Gen. Laws ch. 21M §6. An escort tug can take over control of a vessel if the primary tug fails, insuring that the vessel will not stray from the recommended navigational route. It will also enhance communication in the event of an emergency.

The Oil Spill Prevention Law requires single-hulled vessels transporting more than 6,000 barrels of oil through Buzzards Bay to have a designated lookout on board and two crew members on board the barge if the barge is equipped for crew. Mass. Gen. Laws ch. 21M §4(a)-(c). The dangerous ledges, reefs and currents at the ends of the Bay in addition to the ‘Sow and Pigs’ and ‘Hens and Chickens’ reefs flanking the southwest entrance and Cape Cod Canal and Cleveland Ledge to the northeast create a dangerous and unique navigational environment which are addressed by these manning requirements.

The Oil Spill Prevention Law requires that tank vessels operating in Buzzards Bay travel only within the designated vessel route appearing on the National Oceanic Atmospheric Administration (“NOAA”) chart, or as designated by the Coast Guard, unless special circumstances make travel outside a recommended vessel route necessary. Mass. Gen. Laws ch. 21M §5. The unique navigational hazards of the Bay make a designated vessel route necessary and appropriate. Historically, the serious marine incidents in Buzzards Bay were caused by straying outside the recommended vessel route. Buzzards Bay Project et al., *Buzzards Bay Comprehensive Conservation and Management Plan* (1991).

Finally, the Oil Spill Prevention Law requires that vessels crossing Buzzards Bay carrying oil, hazardous material, or hazardous waste employ a state-licensed pilot. Mass. Gen. Laws ch. 103 §21. State pilots are trained and experienced in the unique navigational hazards and conditions of Buzzards Bay and they can provide the necessary expertise for safe navigation. Federally licensed pilots are not subject to the level of testing necessary for proper navigation through Buzzards Bay.

In summary, the Oil Spill Prevention Law provides the required protections to reduce the risk of future oil spills in Buzzards Bay, protect the sensitive marine environment, and insure the economic health of the surrounding communities.

B. The Commonwealth's Oil Spill Prevention Law is Constitutionally Proper

The plaintiffs in this case incorrectly assert that the Oil Spill Prevention Law is preempted by federal law. United States Supreme Court jurisprudence is clear that there are areas and circumstances reserved for State action. In *Ray v. Atlantic Richfield Co.*, 435 US 151 (1978), the Court held that Title I of the Ports and Waterways Safety Act (PWSA) 33 USC §1223(a) allows a State to regulate its ports and waterways, so long as the regulation is based on “the peculiarities of local waters” that call for special precautionary measures and do not conflict with federal laws. 435 U.S., at 171. A conflict will exist “when compliance with both state and federal law is impossible” *United States v. Locke*, 529 US 89, 109 (2000) citing *California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989). The Court reaffirmed and further relied on the holding of *Ray* in *Locke* asserting that the “Ray Court’s interpretation of the PWSA is correct and controlling”. 529 U.S., at 90. Congress preserved a state’s ability to regulate the peculiarities of local waters, such as depth and narrowness as long as there is no conflict with federal law. *Locke*, 529 U.S. at 91 citing *Ray v. Atlantic Richfield Co.*, 435 US, at 171-172, 178.

The Commonwealth of Massachusetts is operating within the authority preserved to it by Congress in Title I of PWSA. The Oil Spill Prevention Law is sufficiently tied to the peculiarities of Buzzards Bay and allows vessels to comply with state law without conflicting with federal law. The escort tug requirement is limited in its application to vessels transporting 6,000 or more barrels of oil through Buzzards Bay. Mass. Gen. Laws ch. 21M §6. The escort tug requirement is justified by Buzzards Bay’s unique navigational hazards and vital natural

resources. Similarly, the designated lookout provision of the Oil Spill Prevention Law applies solely to single-hulled vessels transporting more than 6,000 barrels of oil through Buzzards Bay. Mass. Gen. Laws ch. 21M §4(a)-(c). The designated look out provision is within the Commonwealth's authority to regulate because the provision is sufficiently tied to the peculiarities of Buzzards Bay.

The Commonwealth requires that a vessel transiting Buzzards Bay carrying oil, hazardous material, or hazardous waste employ a state-licensed pilot. Mass. Gen. Laws ch. 103 §21. This requirement assures that hazardous cargoes transported through this ecologically sensitive and navigationally challenging Bay is done by the most experienced persons. The application of this provision is limited to Buzzards Bay and its unique peculiarities. The Commonwealth is acting within the powers reserved to it by Congress.

To insure the safest possible route is traveled, the Commonwealth properly designated a recommended navigation route for Buzzards Bay. Title I of the PWSA authorizes the Coast Guard to enact measures for protecting navigation. *Locke*, 529 U.S. at 90. However, the Coast Guard has not designated a recommended vessel route for Buzzards Bay. The Commonwealth requires vessels traveling through Buzzards Bay to use the navigational route designated on the NOAA charts unless deviation from a designated route is necessary in the event of an emergency. Mass. Gen. Laws ch. 21M §5. This requirement applies strictly to Buzzards Bay because of its unique navigational hazards and peculiarities. The Commonwealth's law does not conflict with federal law.

CONCLUSION

The Commonwealth's Oil Spill Prevention Law is specially designed to reflect the unique conditions that exist in Buzzards Bay. It seeks to protect the sensitive marine environment,

prevent further economic harm to tourism and fishing industries, and protect citizens' health and well being. The amici communities request that the Court deny plaintiff's Motion for Judgment on the Pleadings.

Respectfully submitted,

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Dated: July 21, 2005